INTRODUCTION

ASTRA's general approach to regulatory reform

ASTRA believes that consumers will be better served by an open and competitive marketplace that encourages investment and innovation. This means reducing the amount of sector specific and market distorting regulation to a minimum.

Not only is this desirable as a matter of principle; it is reinforced by the fact of convergence which allows a plethora of unregulated new entrants and services to enter the sector to challenge old business models and incumbent media organisations. It is inconceivable that the existing convoluted rules could be effectively applied to these new market participants. The only way to enable fair competition amongst all participants, therefore, is to dismantle much of the current regulatory regime.

ASTRA submits that greater competition, underpinned by balanced regulation, is more likely to maximise consumer outcomes by promoting investment and fostering innovation. It will also generate greater economic activity and therefore increase taxation revenues available to the Commonwealth. Conversely, regulation that distorts competition or applies asymmetrically will hinder investment and innovation, and harm Commonwealth revenues.

Advances in broadcasting may be enabled by technology, but the benefits they promise to consumers will be delivered only to the extent they are supported by freer markets and fairer competition.

About the subscription television (STV) sector

The nature of subscription television (STV) differs fundamentally from free-to-air (FTA) television and online content providers.

Unlike FTA broadcasters, whose business model depends on aggregating mass audiences for the benefit of advertisers, the foundation of the STV industry is delivering niche, specialised programming to highly targeted audiences with whom broadcasters have a direct customer relationship. This model provides, to consumers willing to pay for it, a wide range of specialised content that could not be commercially supported by FTA television.

STV is delivered by a diverse range of independent commercial entities. While much content is provided by channels owned and operated by Foxtel, the majority of Australian STV channels are provided by over 20 independently owned and operated entities, including Australian-based representatives of international media companies, small domestic channel groups and even community-based channels. Some 61% of channels are owned and operated independently of Foxtel.

Since STV does not enjoy special privileges and protections from competition, does not enjoy public subsidies, and maintains a direct commercial relationship with paying customers who elect to take the service, it is widely accepted that the STV sector is subject to fewer regulatory obligations than FTA television. There is and should remain a direct relationship between the extent of an industry's privileges and the extent of its obligations to the community.

Whereas the average revenue per commercial FTA channel (considered nationally) in 2012/13 was $422 million,[1] the average revenue for Foxtel for each unique STV channel on its platform was only $32 million.[2] STV channels may generate a fraction of the revenue enjoyed by their FTA channels, yet in many cases they are exposed to the same regulatory obligations – and in some cases even more. These costs may not only be borne by STV channels, but also may be passed through to independent production houses, equipment suppliers and others. Regulators must have regard to this impact not only in determining the appropriate degree of regulation to apply to STV entities, but, importantly, in determining how compliance may be demonstrated. To do otherwise would render some STV channels unviable, to the detriment of Australian television audiences.

Taxpayer support for FTA broadcasters

It will cost the Commonwealth at least $6 billion – or $23.6 million per week – to support FTA television in 2012/13 and over the forward estimates period. Of this, $424 million will be required for digital switchover and associated costs, $4.849 billion to directly fund TV broadcasting and distribution by the ABC and SBS, $106 million for the ABC for the Australia Network, and $761 million to fund a 50% reduction in license fees already obtained by the FTA industry. A further license fee rebate sought by the FTA industry, from 4.5% to 1% of eligible revenue, would cost taxpayers a further $363.8 million over the three years it could apply between now and 2016/17.

Support	Current	Forward estimates				5 year total ($m)
	FY12/13 ($m)	FY13/14 ($m)	FY14/15 ($m)	FY15/16 ($m)	FY16/17 ($m)	
Digital switchover and associated costs	190.5	135.0	65.5	21.4	11.8	424.2
ABC and SBS TV production & distribution	910.0	978.0	984.0	999.0	978.0	4,849
Australia Network payment to ABC	20.3	20.8	21.2	21.6	22.1	106
License fee rebate (from 9% to 4.5%)	143.4	150.2	152.0	156.7	159.1	761.4
Total	**1,264.2**	**1,284**	**1,222.7**	**1,198.7**	**1,171**	**6,140.6**
Potential further license fee rebate (4.5% to 1%)	-	-	118.2	121.9	123.7	363.8
Total (if further rebate granted)	**1,264.2**	**1,284**	**1,340.9**	**1,320.6**	**1,294.7**	**6,504.4**

Source: PwC, excludes Screen Australia funding for which current data is not available.

[1] Based on total commercial FTA advertising revenue for 212/13 ($3,798 million) divided by the number of primary and secondary commercial channels delivered on a national basis. Source: Free TV media releases 31 January & 29 July 2013.

[2] Based on Foxtel revenue for 2012/13 of $3,071 million divided by the total number of unique channels on the Foxtel platform, excluding standard definition simulcast and time-shifted channels.

In addition, there are also substantial benefits received by the FTA broadcasters regarding the value of the spectrum they receive from government. The auction of the digital dividend spectrum in April 2013 revealed a market value of $1.36 per MHz/pop for digital dividend spectrum.

Applying this market value suggests that the FTA broadcasters' remaining holdings of 210 MHz may hold a value of approximately $6.5 billion. However, the value for the specific spectrum bands they still hold is difficult to estimate with any precision, due to the uncertainty over future designations of these bands for uses such as mobile broadband.

The remainder of this submission proposes policy reforms recommended to the Commonwealth by ASTRA.

PROPOSED REFORMS

1. Reform Australian content obligations on STV

Under the *Broadcasting Services Act 1992* (BSA), STV services that predominantly deliver drama programs must ensure 10% of program expenditure is allocated to new Australian content.[3] Compliance with this requirement must be reported in two ways each year to the ACMA: first, by relevant STV licensees, and secondly, by independent channel providers.

Under the current scheme, nearly 30 channels are reported to the ACMA by a number of different channel providers, and licensees are required to lodge an additional licensee return. Each channel provider and licensee must engage an auditor at their cost to verify the returns before lodgement. Data collection and preparation of returns is time consuming and costly, with auditing costs being up to $15,000 per year for some licensees.

Removing minimum expenditure requirements and replacing these with an incentive-based scheme would remove compliance costs for licensees and channel providers in calculating and collating annual expenditure levels, and the costs to the ACMA of overseeing this process.

Proposed reform
Australian content obligations on STV should be eliminated in recognition that the STV sector does not enjoy any special privileges or protections, and is a discretionary service funded directly by paying customers. Content obligations should be replaced with an incentive-based scheme.

2. Reform Australian content funding arrangements

The Commonwealth provides financial support for the production of Australian television content through direct investment for Australian drama, children's and documentary programming, administered by Screen Australia; and tax incentives for private investment through the Producer Offset scheme (under tax legislation, but also administered by Screen Australia). Further funding is available through State and Territory-based agencies (such as Screen NSW).

In 2011/12 the value of Commonwealth Government funding for film and video production and distribution was $107.3 million, with an additional $103.2 million from State and Territory governments.[4] Current funding schemes are complex and involve complicated application and acquittal processes. Any steps that could be taken to streamline them would result in savings for both the taxpayer and the industry.

ASTRA members enjoy close and constructive working relationships with Screen Australia and recognise the public policy rationale for supporting the production of culturally significant television content. However, existing regulation and Screen Australia funding guidelines limit the extent to which STV can access Screen Australia's support. For instance:

[3] BSA, Part 9, Div 2A.
[4] ABS, *Cultural Funding by Government 2011-12*, 1 August 2013.

- Documentary funding is subject to an 'indicative allocation' of 50% to the ABC, 40% to SBS and 10% to all commercial FTA and subscription broadcasters.[5] The distribution of drama funding is also skewed by funding guidelines, with the result that 92% of all TV drama funding between 2006 and 2010 was allocated to competitors of STV.

- Funding guidelines do not account for differences in the value productions that can be justified by the FTA and STV business models. A tax offset is available to qualifying Australian documentary production expenditure of $250,000 per broadcast hour with a threshold of $500,000. This favours FTA productions which, because they can command larger audiences and higher advertising revenues, can justify larger production budgets. The skewing of funding is exacerbated by the fact that film production enjoys a higher tax offset rate (40%) than television (20%) despite the overwhelming popularity of television over feature film.

- For a co-production of new Australian drama between STV and a commercial FTA broadcaster to be subsidised, the program must be first shown on FTA television to count towards the Australian content requirements of both FTA and STV, significantly reducing the incentive for STV to enter into co-production arrangements.

- The definition of 'documentary' for the purposes of Government funding is excessively restrictive, failing to encompass the styles and formats of factual programming that have evolved over time to respond to audience demand.

Proposed reforms

A broadcaster that is already directly funded by the Commonwealth should not have priority over entities that are not. Full contestability should be a core funding principle for any publicly funded project.

The threshold for qualifying production costs should be reduced to enable equal participation by FTA and STV platforms, and the producer offset for television program production should be increased from 20% to 40% to align with the offset available for feature films.

The definition of 'documentary' for the purposes of Commonwealth funding should be broadened to encompass the styles and formats of factual programming that have evolved over time to meet audience demand.

The number and complexity of Screen Australia funds should be reduced over time, with the ultimate objective of making tax offsets rather than direct funding the dominant model for supporting local production. This would reduce both Screen Australia operational costs and applicant costs.

[5] Screen Australia website: http://www.screenaustralia.gov.au/funding/documentary/NDP.aspx

3. Australia Network tender

The Australia Network is a Commonwealth-funded overseas television broadcasting service established to pursue foreign and trade policy objectives including: promoting Australia's engagement across the Asia-Pacific and Indian subcontinent; fostering an understanding of Australia as a dynamic, culturally diverse nation; and raising awareness of Australia's economic and trade capabilities.

Since 2001 the ABC had delivered the Australia Network under five-year contracts with the Department of Foreign Affairs and Trade. In 2011, a tender process for the Network commenced, with the Australian News Channel (ANC – the provider of Sky News) reported to have been recognised by the independent tender evaluation board at both the first instance, and after tender criteria were revised, as the preferred tenderer. However, the then Government ended the tender process and appointed the ABC as the permanent provider of the Australia Network.

ASTRA submits that there are no substantive public policy grounds that would prevent the Australia Network being re-opened to competitive tender. Indeed, a competitive tender process would ensure that taxpayers would have the best value for money delivery of the service (valued at up to $223 million over 10 years at the time of the 2011 tender). Further, there is no public policy reason to suggest that the ABC is uniquely placed to deliver the Australia Network service – the contract should be awarded to the organisation (public or private) that can most effectively and efficiently deliver the service.

Proposed reform
The Australia Network should be re-opened to a competitive tender process.

4. Spectrum allocation and management

Spectrum for commercial activities should be subject to price-based allocation processes.

Spectrum allocated to commercial FTA broadcasters is not subject to a competitive price-based process, but is rather provided to broadcasters as part of the broader commercial TV licensing arrangements, with their associated obligations and protections. As such, licence fees for commercial FTA broadcasters, calculated from gross revenue, do not reflect the full market value of spectrum used.

The auction of the digital dividend spectrum in April 2013 revealed a market value of $1.36 per MHz/pop for digital dividend spectrum. Applying this market value suggests that the FTA broadcasters' remaining holdings of 210 MHz may hold a value of approximately $6.5 billion. However, the value for the specific spectrum bands they still hold is difficult to estimate with any precision, due to the uncertainty over future designations of these bands for uses such as mobile broadband.

In 2012/13 the commercial FTA broadcasters paid license fees of $294 million, but after receiving a rebate, effectively paid just $151 million. The cost to the taxpayer of this rebate in 2012/13 and over the forward estimates period is $761 million. Despite the size of this gift, the FTA broadcasters are now seeking yet another license fee reduction, this time taking their effective fees from 4.5% to 1% of eligible revenue. This windfall to FTA networks would cost taxpayers a further $363 million, bringing to $1.125 billion the transfer of value from taxpayers to FTA networks.

Cost to taxpayers	$m
Reduction in FTA license fees from 9% to 4.5% (already granted)	761.4
Further reduction in FTA license fees from 4.5% to 1% (sought)	363.8
Total cost to taxpayers	1,125.2

Source: PwC

Furthermore, ASTRA submits that the amount paid in licence fees by commercial FTA broadcasters is highly unlikely to represent the true value of their broadcast spectrum. In 2011, Deloitte Access Economics valued the commercial FTA broadcaster access to post-switchover broadcast spectrum at $235.5 million per annum.[6] Applying the same methodology to the revised value above, the annualised value of access to broadcast spectrum for commercial FTA broadcasters could be up to $370 million per annum in 2012/13, a fraction of which is recovered in licence fees.

ASTRA submits that there should not be a permanent reduction in licence fees without addressing the imbalances between regulatory privilege and obligation in the FTA sector, and an assessment of the true value for commercial FTA broadcasters of access to broadcast spectrum.

ASTRA recognises that sufficient spectrum capacity must be reserved for public interest requirements such as defence, emergency and essential services, and for scientific and metrological purposes. Spectrum allocation policy also needs to reflect international agreements on uses for particular frequencies and technical requirements for interference management.

Beyond these public interest requirements, price-based allocation of spectrum for commercial use is more likely to encourage the most efficient use of spectrum to provide the media and communications services that consumers want. Consideration could be given to limiting the ACMA's broadcasting spectrum planning requirements to technical and transmission issues, at least to the extent that they relate to commercial and national FTA broadcasters. The extent to which there is a 'demand' for additional services in a particular geographic location is best left for the market to determine.

ASTRA would welcome further competition in the media and communications industry, including from new players who want access to the 'spare' block of broadcast spectrum that will remain after final allocation of the Digital Dividend, whether they be new broadcasting licensees or other innovations such as a multiplex of community channels, or for the provision of communication services other than broadcasting.

ASTRA does not believe that FTA broadcasters require additional spectrum to support possible future technical migrations of terrestrial digital television services (such as to DVB-T2 or MPEG-4) or new services such as 3D and additional HD. Existing spectrum allocated for terrestrial digital television broadcasting could be used far more efficiently by incumbent commercial and national FTA broadcasters using multiplex arrangements, negating the need for additional capacity to implement a transition to new transmission platforms. Even where commercial FTA broadcasters' automatic access to spectrum continued, an MPEG-4/DVB-T2 migration could be accommodated using existing spectrum allocations through a coordinated and cooperative approach by incumbent broadcasters.

[6] Appendix C to ASTRA's submission to the Convergence Review, November 2011, available at www.astra.org.au.

5. Overlapping regulatory obligations

ASTRA notes a range of provisions in the codes of practice for subscription television and radio that overlap and/or duplicate existing Federal or State laws, and thus involve unnecessary and additional regulatory compliance costs for both the regulator and the regulated, including:

- ***Consumer protection provisions*** – under existing legislation codes of practice for STV services are expected to include provisions for dealings with customers of the licensees, including methods of billing, fault repair, privacy and credit management. STV services are already subject to the Australian Consumer Law, with the inclusion of such provisions in codes of practice adding an unnecessary additional regulatory layer (particularly as the ACMA does not even handle complaints under the relevant code provisions, as any complaints relating to consumer issues that are not satisfied by the STV licensee are referred to State or Territory consumer affairs agencies).
- ***Data privacy*** – the BSA similarly expects that codes of practice will address issues of customer privacy, when STV licensees are already subject to privacy obligations under the *Privacy Act 1988* (Cth), overseen by the Office of the Information Commissioner.
- ***Anti-discrimination/anti-vilification*** – the BSA expects that codes of practice will take into account the portrayal in programs of matter that is likely to incite or perpetuate hatred against, or vilifies, any person or group on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability. Such concerns are already adequately addressed under discrimination law as administered by the Australian Human Rights Commission, and do not need a further layer of regulatory oversight under broadcasting legislation.

Proposed reform
Remove those parts of subscription television and radio codes of practice that overlap with and/or duplicate existing Federal or States laws.

6. Increase competition for sports broadcasting rights

Competition for sports broadcast rights drives innovation and choice to the benefit of consumers, while increasing the potential revenues for sports bodies to re-invest in their sports communities. Despite this, sports broadcast rights in Australia are restricted by the so-called 'anti-siphoning regime' which directly limits competition between for a list of sporting events that is longer than anywhere else in the world.

ASTRA has outlined in other submissions to Government the consumer detriment caused by the anti-siphoning regime, and supports the recent call by Foxtel for a reformed regime which would introduce a 'split rights' arrangement that increases competition to the benefit of consumers. This submission will not deal with these arguments at length.

A significant proportion of revenue earned by sporting codes from the sale of broadcast rights is returned to development of sports at the grassroots level and to programs aimed at greater community participation and social inclusion. Many sports bodies have developed programs for Indigenous and multicultural communities, for instance, as well as promoting and encouraging the participation of people from disadvantaged backgrounds.

The anti-siphoning scheme has a negative impact on the ability of sporting organisations to maximize the value of their rights, even for those listed events that the FTA networks will not broadcast. This adversely impacts the sporting organisations, the funding for their key participants, the costs of staging events and other downstream impacts such as grassroots and junior bodies. The greater the competitive tension for the acquisition of broadcast rights, the more likely that sporting bodies will receive greater revenues and be able to increase investments in local communities and programs.

ASTRA notes that, in 2012/13, the Commonwealth Government allocated more than $500 million to sports bodies and sports-related programs, ranging from elite sports programs through to community, grass-roots sporting activities.[7] It could be expected that the greater the value that sports bodies can receive for the broadcast rights to their premium competitions and events, the less these sporting bodies will need to rely on additional funding from Government.

In addition, reforms to this regime would reduce the administrative burden on the Minister for Communications and his Department which currently has to regularly assess so called 'de-listing' applications made by FTA broadcasters seeking to broadcast listed events on their multi-channels.

Proposed reform
Reform the anti-siphoning scheme by introducing a system of 'split rights', thus assisting sporting codes to raise additional revenues that will help alleviate the need for the Commonwealth to fund grass roots sporting activities.

7. Simplify captioning red tape

The relatively new closed captioning provisions contained in Part 9D of the BSA oblige 70 STV channels (this number increases with time) to provide progressively increasing rates of captioning.

While the STV industry is committed to meeting captioning levels, the current regulatory framework is administratively very demanding and has required significant further investment by various entities, in both capital and operational expenditure to meet compliance requirements, which would be better spent on increased captioning levels. The requirements of the new legislation are so demanding that some ASTRA members estimate they spent 20 working days preparing and processing captioning exemption and target reduction orders.

Naturally, there is a corresponding burden on the ACMA to administer the scheme.

ASTRA considers that the existing captioning provisions require significant amendment to remove unnecessary regulatory and compliance burdens on the STV sector. Such amendments would include:

- recognition of channel provider entities – presently, the legislation places obligations on STV licensees, when in practice the obligation (and costs) are shared between STV licensees and independent channel provider organisations;
- more practical arrangements for repeat programs;

[7] R. Jolly, *Sports funding: federal balancing act, Parliament of Australia, Department of Parliamentary Services*, Background note, 27 June 2013.

- a more practical annual deadline and greater flexibility for exemption and target reduction order applications, including empowering the ACMA to work iteratively with licensees on applications for target reduction orders;
- giving channel providers the ability to aggregate captioning requirements across a suite of channels owned and operated by that channel provider (for example, the FOX SPORTS suite of channels);
- ensuring that a channel provided on more than one STV platform has the same captioning target regardless of platform on which it is carried;
- ensuring captioning standards take into account the technical and other limitations regarding captioning provision; and
- giving the ACMA better guidance on the use of its discretion when developing captioning quality standards and processes for record-keeping and reporting, which are currently excessive and unnecessarily burdensome.

A statutory review of captioning levels on FTA multi-channels was repealed by Parliament in March 2013, maintaining the current captioning moratorium on these channels. This means that, whereas captioning levels on STV are legislated to increase each year until all channels provide 100% captioning 24 hours a day, captioning obligations on commercial FTA broadcasting licensees will, from 1 July 2014, remain static at 75% of programming only on the primary service, with no requirement to provide captions on secondary channels (except for repeats).

Moreover, there are no captioning requirements at all for datacasting channels provided by commercial FTA broadcasters (such as home shopping channels), despite similar or identical services on STV being subject to captioning obligations. This means STV broadcasts will often (and increasingly) be subject to more onerous captioning obligations than FTA broadcasts, despite attracting much smaller audiences.

The administrative burden of the new captioning regime falls not only on industry, but also the ACMA, the regulator responsible for processing and making decisions about applications, and monitoring compliance with the very prescriptive regulations.

Proposed reform
Reform the current regulatory framework applying to captioning in the ways outlined above.

8. Remove revenue restrictions on STV

Existing legislation requires that subscription fees be the "predominant source of revenue" for a subscription broadcasting service.[8] This obligation serves no other purpose than to protect the revenue sources of FTA commercial television broadcasting services.

While STV operators do not plan to increase advertising to anywhere near the levels broadcast on FTA networks, the condition is a disincentive to explore and introduce alternate revenue models and the provision of additional services which may benefit consumers. ASTRA submits that provided that a STV service is available for a subscription fee, there should be no prescription that such fees account for a provider's primary source of revenue.

[8] BSA, Sch 2, cll 10(2)(b), 11(2).

This licence condition creates an anti-competitive disadvantage for both existing STV providers compared with terrestrial broadcasters and an anti-competitive disadvantage for new entrants.

Proposed reform
Remove the restriction on revenue sources available to STV